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REFLECTIONS ON ALFRED HILL'S
"TESTIMONIAL PRIVILEGE AND
FAIR TRIAL"

Peter Westen*

The clash between testimonial privileges and the Sixth Amendment is becoming increasingly common. A criminal defendant, exercising his Sixth Amendment right to examine witnesses for evidence in his defense, puts questions to a witness; the witness, asserting a testimonial privilege to remain silent, refuses to answer. The privilege may belong to the government, such as a national security privilege, or to a private party, such as the lawyer-client privilege. The privilege may have its source in the Constitution, a statute, or common law, and may be asserted on either cross or direct examination. Whatever the context, courts asked to resolve this conflict face a similar task: weighing the constitutional interest of the defendant in securing exculpatory evidence against the interest of the witness in preserving confidentiality.

In resolving such conflicts, federal courts tend to give considerable weight to a defendant's interest in discovering and introducing exculpatory evidence on his behalf. Commentators generally applaud this trend. The applause, however, has not passed without dissent. In a recent article, "Testimonial Privi-

* Professor of Law, University of Michigan Law School. B.A., 1964, Harvard University; J.D., 1968, University of California, Berkeley. I would like to thank Professor Robert Weisberg of Stanford for his generosity and insight in reading and commenting upon an earlier draft of the article.

1 See authorities cited in Westen, Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another, 66 Iowa L. Rev. 741, 769 n.24 (1981). See also Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").

lege and Fair Trial," Professor Alfred Hill comes to some revisionist conclusions about the balance between defendant and witness in criminal cases. His revisions fall into three general areas.

First, he questions the commonplace remedy of ordering witnesses to testify in derogation of testimonial privileges. In his view, courts nowadays resort to compelled testimony as a remedy "on the theory that nothing less [will] do to protect the constitutional rights of the accused." He questions this "theory," arguing that the remedy of compelled testimony is either excessive or inadequate: excessive, because the rights of an accused can be safeguarded equally well by the remedy of compelled dismissal; inadequate, because the rights of a defendant cannot be fulfilled if a recalcitrant witness willfully violates an order to testify.

Second, and wholly aside from the question of remedy, he questions the established right of a defendant to seek relief from assertions of private privilege by his own witnesses. In his view, the right to relief rests on a paradox: either a defendant can show in advance that a privileged witness possesses exculpatory evidence, or he cannot make such a showing. One who can make such an evidentiary showing by hypothesis already possesses everything he needs; hence, his claim for further testimony must be deemed superfluous. One who cannot make such a showing does not possess what he needs to override the privilege; hence, his claim for relief must be deemed inadequate. In either event, he cannot complain about the witness' assertion of privilege.

Third, Professor Hill questions the commonplace tendency to treat assertions of privilege as a single problem. In his view, prosecution witnesses should be treated differently from defense witnesses, and government privileges should be treated differently from private privileges. Thus, a defendant who has no right to relief from an assertion of private privilege by his own witness may be entitled to relief under the same circumstances from (1) an assertion of privilege by a prosecution witness, and (2) an assertion of government privilege by a witness for the defense.

I have learned a great deal from "Testimonial Privilege and Fair Trial"—as I always do from Professor Hill's work. Indeed, he has changed my way of thinking in this area in several important respects. At the same time, I come to rather different con-

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* Hill, Testimonial Privilege and Fair Trial, 80 COLUM. L. REV. 1173 (1980).
* Id. at 1173.
clusions than he regarding each of his three major topics. Part I of this article examines the problem of finding a “remedy” for testimonial privileges that violate a defendant’s right to a fair trial. Part II discusses the problem of determining when a defendant is entitled to assert that the “right” has been violated. Finally, Part III analyzes the problem of distinguishing for purposes of entitlement between prosecution witnesses and government privileges on the one hand, and defense witnesses asserting private privileges on the other hand.

I. THE PROBLEM OF REMEDY

Professor Hill takes as his point of departure a “novel” line of recent decisions that appear to him to be “plainly wrong.” As he reads them, the decisions stand for the proposition that when testimonial privileges deny a defendant a constitutionally fair trial, the proper constitutional remedy is to compel the witness to testify rather than to dismiss the prosecution. Professor Hill objects to these decisions (as he reads them) on substantive as well as formal grounds: substantive, because he believes that given the nature of the defendant’s claim of right, the remedy of compelling a witness to testify in derogation of a privilege both goes too far and, ironically, sometimes fails to go far enough; formal, because he believes that given a conflict between a witness’ claim of privilege and a defendant’s right to a fair trial, a remedy can always be framed in nonconstitutional terms without resorting to constitutional adjudication.

As usual, Professor Hill analyzes this problem in an original and provocative manner. Indeed, his comments are sufficiently rich in insight that they could probably be restated in such a manner to remove most grounds for disagreement. Yet, as presently stated, both his substantive and formal objections seem to me to be misleading, if not mistaken.

A. The Substantive Objection: The Constitutional Remedy of Compelling Testimony In Derogation of a Privilege

Professor Hill’s substantive objection, while analytically correct, appears to be premised on a strawman. He proceeds on the premise that courts nowadays order witnesses to testify in dero-
gation of claims of privilege in lieu of the alternative remedy of allowing the case to be dismissed. On the basis of that premise, he concludes that these court-ordered remedies exceed constitutional norms. Professor Hill is entirely correct in his conclusion. With respect to constitutional claims to a fair criminal trial, no justification exists on constitutional grounds alone for insisting on compelled testimony in lieu of the alternative remedy of dismissal. The defendant in such cases does not assert a right to compel privileged testimony as such, but a right not to be convicted unless the court compels such testimony. A defendant who demonstrates that an assertion of privilege would deny him a fair trial is constitutionally indifferent as to remedy. Either compelling the witness to testify or accepting the prosecution's dismissal of its case will entirely vindicate the defendant's fair trial rights. Given the defendant's constitutional indifference as between the two remedies, a court cannot rely on constitutional grounds alone for compelling testimony in the face of a prosecution's preference for dismissing the case. A court that insists upon either the one alternative or the other as an exclusive constitutional remedy exceeds constitutional requirements in remedying the constitutional injury at issue. 

* As Professor Hill puts it, "state courts have required the testimony of the witness in derogation of a privilege, on the theory that nothing less would do to protect the constitutional rights of the accused." Id. at 1173 (emphasis added). It is fair to assume that he would distinguish a case in which a court puts the prosecution to the choice between either proceeding with its case (thus compelling a third-party witness to testify in derogation of a private privilege) or dismissing or otherwise altering its case against the accused (thus permitting the witness to stand on his claim of privilege), because he distinguishes Davis v. Alaska, 415 U.S. 308 (1974), on that ground. See Hill, supra note 3, at 1178.


• This is not to say that there is never any legal ground for insisting on compelling testimony in lieu of dismissing a case. As I discuss later, the choice of remedy depends upon the content of the domestic law. See notes 44-49 and accompanying text infra. Accordingly, if the legislature has made it clear that it prefers the remedy of compelling testimony to the remedy of dismissal, the courts have a nonconstitutional legal obligation to compel testimony in lieu of dismissing the case.

Nor do I mean to suggest that while a court is never justified on fair trial grounds alone in insisting upon the remedy of compelling testimony, it is not justified in doing so on any other constitutional ground. The most I mean to say is that as far as constitutional rights to fair trial are concerned, the remedies of compelling testimony and dismissing the prosecution are constitutionally interchangeable. With respect to individual privileges, there may well be independent constitutional grounds for insisting on one remedy or the other. Thus, it might be argued that the priest-penitent privilege is constitutionally based, and that its nature is such that courts are constitutionally compelled to resolve conflicts between a priest-penitent privilege and fair trial by dismissing the prosecution. For further discussion of these points, see notes 9 & 13 infra.

• See Westen, supra note 1, at 767 n.19.
The problem with Professor Hill's argument is not its conclusion, but its premise. It is not true that courts are compelling disclosure of privileged information on the "theory" that "nothing less [will] do to protect the constitutional rights of the accused." Indeed, as far as I know, no court on constitutional grounds has ever ordered a witness to testify over a claim of privilege in lieu of allowing the prosecution to dismiss its case. Instead, the cases are all ones in which the court either explicitly instructs the prosecution to choose between the issuance of an order to testify or dismissal of the case, or implicitly does so by conditioning further prosecution on the issuance of such an order. Rather than compel testimony as an exclusive constitutional remedy, courts invariably require the prosecution to choose on nonconstitutional grounds between one of two alternative remedies: either to accept an order compelling the witness to testify or, alternatively, to dismiss its case against the accused.

Professor Hill's principal case, In re Farber, provides a good example. Dr. Mario Jascalevich, a defendant accused of murder, attempted to subpoena Myron Farber's newspaper article notes in the face of the latter's assertion of a newsman's privilege under a state "shield law." The trial judge in Farber did not rule that Dr. Mario Jascalevich would be entitled to subpoena Farber's notes even if the criminal case against him were dropped. Nor did the judge rule that the criminal case against the defendant would continue even if the prosecution preferred to dismiss it. Rather, the trial judge ruled that Dr. Jascalevich could not

It is worth emphasizing that we are talking here only about what the Constitution requires in the way of remedy. The Constitution does not require either dismissal or disclosure. What it requires is one or the other. The court, nevertheless, has an obligation to pick on nonconstitutional grounds whichever remedy the legislature prefers under the circumstances. For a discussion of the standards that govern the selection of remedy on a nonconstitutional level, see notes 19-31 and accompanying text infra.

10 Hill, supra note 3, at 1173.

11 Courts sometimes explicitly notify the prosecution of its option to avoid compelled testimony by "voluntarily" dismissing its case. See Alderman v. United States, 394 U.S. 165, 181 (1969); Roviaro v. United States, 353 U.S. 53, 65 n.15 (1957). In most cases, there is no need to advise the prosecution of its power to avoid the consequences of continued trial by dismissing its case, because the prosecution knows full well that it always has that option. Indeed, courts are so reluctant (or so unable) to compel the prosecution to proceed with a case that the prosecution wishes to drop that they tend to read out of existence rules of court that require the prosecution to obtain "leave" of court before dismissing a case. See United States v. Cowan, 524 F.2d 504 (5th Cir. 1975); Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977). On the issue of the inability of the courts to compel the executive branch of government to prosecute a criminal case over the prosecutor's objections, see note 31 infra.

fairly be tried unless Farber produced the privileged material for in camera inspection and hence, that Dr. Jascalevich was entitled to subpoena the notes as long as the prosecution persisted in pressing its case against him. The court thus delegated to the prosecution the nonconstitutional choice between continuing with the trial (thus accepting the remedy of in camera inspection), or allowing Farber to stand on his privilege (thus accepting the remedy of dismissal). The trial court eventually enforced the subpoena not because the court insisted upon disclosure as an exclusive remedy, but because the prosecution had implicitly rejected the alternative remedy by opting on nonconstitutional grounds to proceed with its case.

To be sure, one can argue on nonconstitutional grounds that courts misinterpret legislative intent when they delegate the choice of remedies to the prosecution (in lieu of retaining the choice themselves). Similarly, one can argue on nonconstitutional grounds that prosecutors misinterpret legislative intent when they resolve the choice in favor of pressing their cases (in lieu of dismissing them). These are issues to be discussed later.\(^\text{18}\)

The present point is that these nonconstitutional issues have nothing to do with the objection that courts nowadays are ordering witnesses to testify as an exclusive rather than as an alternative constitutional remedy. The answer to that objection is straightforward: courts nowadays are doing no such thing. Courts are not compelling witnesses to testify unless (1) the courts decide on nonconstitutional grounds to delegate the choice of remedies to the prosecution and (2) the prosecution then responds to the authorized choice by opting to press its case. Witnesses who are thus compelled to testify do so because of the very truths Professor Hill wishes to establish: that the right to a fair trial can be satisfied by alternative remedies; that the remedies of dismissal or disclosure are constitutionally interchangeable; that courts are no more justified on constitutional grounds alone in exclusively mandating dismissal than in exclusively compelling testimony;\(^\text{14}\) and that when courts delegate the choice of remedies to a prosecutor who responds by rejecting the remedy of dismissal, the courts are then constitutionally obliged to resort to the alternative remedy of compelling the witness to testify.

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\(^{18}\) See notes 19-31 and accompanying text infra.

\(^{14}\) This is not to say that a court is never justified on nonconstitutional grounds in dismissing a case over the prosecution’s objection. It is not only justified in doing so, it is legally obligated to do so whenever the legislature expresses a preference for dismissal as opposed to compelled testimony. See notes 21-31 and accompanying text infra.
Ironically, at this point in the discussion Professor Hill appears to switch directions by suggesting an objection that diverges from his original one. He objected originally that courts go too far in issuing unconditional orders to testify, in lieu of combining such orders with alternatives for dismissal. His instant objection is that courts sometimes may not be going far enough in providing for the alternative remedies of disclosure or dismissal. Alternative remedies, he suggests, may leave the defendant with the worst of both worlds. The prosecution may opt to press its case (thus denying the defendant the remedy of dismissal), and the witness may refuse to comply with the order to testify (thus denying the defendant the remedy of disclosure). Both occurred in Farber when Myron Farber responded to the subpoena duces tecum by standing in contempt rather than testifying for Dr. Jascalevich in derogation of the newsman's privilege. In such cases, so the argument goes, the remedy of ordering witnesses to testify does not constitutionally remedy the defendant's right to a fair trial, because the order will sometimes result in the defendant being convicted without ever having access to the privileged information.\textsuperscript{16}

The foregoing argument rests upon an erroneous assumption about the nature of the constitutional right to be remedied. The constitutional right at issue in these cases is the Sixth Amendment right of a defendant to present a defense through witnesses. If the right to present witnesses consisted of the right of a defendant actually to obtain everything exculpatory his witnesses might know, then Professor Hill would be correct: the remedy of trying to elicit evidence from a recalcitrant witness by holding him in contempt responds inadequately to a right that consists of successfully eliciting such evidence. In fact, though, a defendant's right to present evidence through witnesses is not a guarantee of success, but rather a right to insist that the government uses its best efforts to assist the defendant in securing evidence in his defense. The state exhausts its obligations — as well as the defendant's rights — by doing everything possible to induce such witnesses to testify.\textsuperscript{18}

\textsuperscript{16} I infer this argument from Professor Hill's statement that the remedy of dismissal (and the remedy of striking a witness' testimony) is "normally superior" to the remedy of ordering a privileged witness to testify because if the witness persists in refusing to testify (as Myron Farber did), the "court's action . . . contribute[s] not an iota to the defendant's ultimate vindication." Hill, supra note 3, at 1175.

\textsuperscript{18} See Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185, 1195-97 (1979). Obviously, this is not to say that residual constitutional standards governing the reliability of evidence in criminal cases do not exist. There are such minimal constitutional standards. The point is that those standards apply not simply to the hearsay statements
This point can be readily illustrated by reference to the law governing nonprivileged witnesses. Assume that the prosecution wishes to introduce an out-of-court statement of a witness who has since died or otherwise become unavailable, or that a defendant wishes to subpoena a witness who has died or lost his memory. If the Sixth Amendment rights of confrontation and compulsory process consisted of a guarantee that the government actually succeed in producing witnesses, a defendant would be entitled to relief in each of the foregoing instances. In reality, a defendant is not entitled to relief in such instances unless he can show that the government has either failed to make appropriate efforts to secure the witness' testimony or has itself caused the witness to become unavailable. The right to produce witnesses is not a right to succeed in securing witnesses, but at most a right to insist that the state make reasonable good faith efforts to secure witnesses for the defense. The same holds for privileged witnesses. A defendant cannot complain when the state genuinely tries but fails to compel defense witnesses to testify, because the defendant is not entitled to demand success. He is only entitled to demand that the state try to succeed.

Government privileges operate in the same way. In the event an assertion of government privilege denies a defendant a fair trial, the government must choose between dismissing its case or waiving its privilege. The government's decision to proceed with the prosecution creates an obligation to waive its privilege and, hence, to use its best efforts to induce the witness to testify. If the witness then persists in refusing to testify, the court must decide whether the contemptuous witness is acting in accordance with government wishes or as a renegade witness on a frolic of his own. In the event it finds the former, the court may invoke a variety of sanctions, including the sanction of involun-
tary dismissal. Courts use dismissal in such cases, however, not as a remedy for violation of a defendant's right to succeed in obtaining evidence, but as a sanction on the government for failing to try its best to obtain evidence from a witness under its control. Dismissal becomes an appropriate sanction because the party responsible for the witness's contempt and the party prosecuting the case happen to be one and the same. 18

In conclusion, the remedy of compelling a witness to testify is never constitutionally inadequate from a defendant's standpoint if it is combined with the alternative remedy of dismissal. For even if the prosecution opts to proceed with the case and the witness thereafter refuses to testify, the defendant's constitutional rights regarding witnesses are fully satisfied by the state's expenditure of its best (though unsuccessful) efforts on his behalf.

B. The Formal Objection: Nonconstitutional Remedies for Conflicts Between Privilege Claims and Fair Trial Rights

Professor Hill recognizes that there are cases in which a defendant is, indeed, entitled to the remedy of compelling witnesses to testify over claims of privilege. He objects, however, to the practice of framing the remedy in such cases in constitutional form. He argues that a defendant's true entitlement to the remedy of overriding a testimonial privilege arises because the legislature or court that created the privilege intended it to be overridden under such circumstances. Accordingly, a court that overrides a privilege in order to afford a defendant a fair trial should emphasize that its decision represents a nonconstitutional interpretation of domestic law and not a constitutional mandate. In his own words:

The [foregoing] analysis . . . is one that can be made, and indeed should be made, of all privileges created by constitution or by statute. If the privilege, fairly construed, protects against requiring disclosure at all costs, then the judicial course is to uphold both the assertion of

the privilege and the claim of the defendant who has made a sufficient showing of constitutional prejudice. . . . If the privilege, as construed, does not have the reach the witness claims for it, there is no need to invalidate the privilege, since it is simply inapplicable. 19

As is usually the case, Professor Hill’s argument is rich in insight. He is right that once a legislature decrees that a defendant’s legal right to present evidence prevails over the combination of a witness’ statutory privilege and the state’s interest in prosecuting him, 20 the legislature’s preferences as to remedy control the choice between disclosure and dismissal. By the same token, once a defendant’s constitutional right to present evidence is held to prevail over the combined interests of the witness and the prosecution, then again, the legislature’s preferences control the choice as between the two constitutionally adequate remedies of disclosure or dismissal. Both are important points and Professor Hill should be credited as being the first to make them.

Nonetheless, it is somewhat misleading for Professor Hill to say there is “no need” ever “to invalidate [a] privilege” 21 on constitutional grounds, because saying that erroneously implies that legal disputes between defendants, witnesses and the prosecution can be resolved on statutory grounds without implicating constitutional norms. In reality, the legislative choice between disclosure and dismissal only comes into play because of an anterior constitutional judgment that the state cannot both pursue its prosecution and sustain the witness’ claim of privilege. The state, upon learning that it cannot constitutionally pursue its first preference for prosecution plus privilege, must then determine on nonconstitutional grounds its second-best preference as between dismissal or disclosure. But no one should be fooled as to the state’s reasons for making the latter legislative choice: it makes the choice not because it wants to, but because it is constitutionally required to do so.

The process of fashioning remedies for equal protection violations provides a good analogy. Assume, for example, that a legis-

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19 Hill, supra note 3, at 1176.
20 In order to prevail on a fair trial claim, a defendant need not show that his fair trial interest is superior to both the state’s interest in prosecution and the witness’ interest in asserting the privilege. It suffices if he can show that his interest is superior to either one or the other, because after such a showing the state cannot insist on both prosecuting him and allowing the witness to assert his privilege at the same time.
21 Hill, supra note 3, at 1176.
lative rule grants women certain benefits that it denies to men. If a court determines the rule to be an unconstitutional denial of equal protection, the court must decide whether to remedy the violation by extending to men the benefits now enjoyed by women or by denying women the benefits now denied men. Since the two remedies are constitutionally interchangeable as far as norms of equality are concerned, the court should select whichever remedy it believes the legislature would prefer under the circumstances. Yet the court does so in full recognition that the selected remedy does not truly represent the legislature's real preference, because the legislature's real preference is to grant the benefits to women while denying them to men. From the legislature's perspective, the choice of remedies represents at best a choice of evils. The legislature makes the choice only because it is constitutionally compelled to do so. If the legislature responds by extending the benefit to men, it does so because given its priorities, it has no other constitutional choice. That is what it means to say that the denial of benefits to men is "unconstitutional." 28

The same analysis applies to testimonial privileges. A court, upon deciding that a criminal defendant cannot be fairly tried upon a witness' assertion of privilege, must decide whether the legislature would prefer the court to dismiss the case or to compel the witness to testify. To describe this choice as purely "a matter of [legislative] construction" 24 misleads, however, because the legislature would not make the choice unless it were constitutionally compelled to do so. A legislature that responds by cutting back on the privilege does so because given the choice it is compelled to make, and given its priorities, it has no constitutional alternative but to give up on the privilege. This, again, is what it means to say that a privilege has been constitutionally overridden. 25

In any event, once a court determines that a defendant cannot be fairly tried in the face of an assertion of privilege, it must make a nonconstitutional choice between dismissal and disclosure. Strangely enough, Professor Hill is ambivalent about how a court should go about making the election. On the one hand, he

25 Hill, supra note 3, at 1176.
26 See, e.g., Confrontation, supra note 17, at 626-27 (1978), quoted in Hill, supra note 3, at 1194, n.93.
stresses the importance of "fairly" construing legislative intent. On the other hand, he sometimes seems partial to the remedy of dismissal, suggesting that a court can "readily" avoid overriding a testimonial privilege by simply dismissing the state's case. In reality, no justification exists for a court's making a unilateral decision to dismiss a prosecution over the state's objection unless the court truly believes that the legislature would prefer the rare remedy of mandatory dismissal to the more common remedy of allowing the prosecution to choose between dismissal and disclosure.

In practice, courts very rarely order the remedy of involuntary dismissal. I cannot recall a single instance in which a court has itself invoked the remedy of involuntary dismissal, as opposed to leaving the choice of remedies to the prosecution. Nor can I think of a single instance in which a legislature could reasonably be said to have intended to delegate decisions regarding dismissal to the courts as opposed to the prosecution. This represents an important distinction because leaving the choice of remedies to the prosecution amounts to compelling privileged witnesses to testify whenever the prosecution chooses to proceed with its case.

It is no accident that courts refrain from dismissing cases over the prosecution's objections, for there are several reasons why a legislature would wish to delegate the choice of remedies to the prosecution rather than to the courts. First, the prosecution has experience in weighing the state's interest in prosecution against countervailing public policies (including policies regarding privacy), because it regularly makes such assessments in the traditional exercise of prosecutorial discretion. Second, in the event

86 Hill, supra note 3, at 1176.
87 Id. at 1178.
88 For an illustration of the reluctance of courts to resort to the remedy of involuntary dismissal in criminal procedure, see United States v. Morrison, 49 U.S.L.W. 4087 (U.S., Jan. 13, 1981) (No. 79-395). Indeed, some authorities have gone so far as to suggest that a federal judicial order precluding the executive branch of the federal government from exercising discretion to prosecute a criminal cause might be unconstitutional as a violation of the principle of separation of powers. See Ullmann v. United States, 350 U.S. 422, 433 (1956) (quoting favorably from Judge Weinfeld's opinion in the court below); Cox, Prosecutorial Discretion: An Overview, 13 Amer. Crim. L. Rev. 383, 394 (1976).
89 The one possible exception is the priest-penitent privilege. It is not unreasonable to assume that if assertion of a priest-penitent privilege would deny a defendant a fair trial, the legislature that created the privilege would wish the courts to rule as a matter of law that the prosecution ought to be dismissed, rather than leave the decision to the prosecution. To that extent, Professor Hill and I are in agreement.
the legislature wishes to delegate the choice of remedies to only one of the two branches of government, it must delegate it to the prosecution, because the prosecution is the only one of the two branches that can make an autonomous choice between dismissal and disclosure. This is so, because courts cannot effectively compel the prosecution to pursue a case it wishes to drop. For both these reasons, legislatures are naturally inclined to allow the prosecution to decide on the appropriateness of dismissal rather than to delegate authority to the courts to dismiss cases over the prosecution's objection. Given a legislature's desire to delegate the choice of remedies to the prosecution (or given an inference of such a desire), a court cannot lawfully take it upon itself to make a unilateral decision to dismiss a case over the prosecution's objection.

II. THE PROBLEM OF ENTITLEMENT

In addition to the issue of remedies, Professor Hill also questions whether certain criminal defendants are ever entitled on the merits to any relief at all from assertions of privilege. He starts by distinguishing between two classes of privileges: (1) all privileges asserted by prosecution witnesses on cross examination or government privileges asserted by defense witnesses, and (2) private privileges asserted by defense witnesses. As he partially explains in a subsequent section of his Article, he believes that criminal defendants are entitled to relief from private privileges asserted by prosecution witnesses in the course of cross-examination and from government privileges asserted by defense witnesses — or, perhaps more accurately, that they are entitled

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81 If I understand him correctly, Professor Hill appears to admit as much. See Hill, supra note 3, at 1187 n.65, 1192. See note 11 supra. For a discussion of the practical (and principled) objections to compelling the executive branch to prosecute a criminal case that it wishes to dismiss, see Note, 9 SUPR. U. L. REV. 1434 (1975). Indeed, some authorities have gone so far as to suggest that a federal judicial order compelling the executive branch of the federal government to press a criminal case it wishes to drop might violate the principle of separation of powers. See Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967) (Burger, J.); Note, Prosecutorial Discretion: An Overview, 13 AMER. CRIM. L. REV. 383, 394 (1976). Of course it is true that the executive branch cannot itself compel the courts to participate in prosecutions they wish to avoid. The difference is, however, that once the legislature vests exclusive, lawful discretion in the executive branch to decide between dismissal and disclosure, the courts cannot frustrate a lawful executive decision to prosecute without themselves flagrantly violating the law on the record; in contrast, if the legislature were to vest exclusive discretion in the courts, the prosecution could effectively frustrate a judicial decision to pursue a case by engaging in acts of omission and neglect, short of openly violating an order to prosecute.
to relief on a lesser showing of cause.\textsuperscript{82} His instant objection concerns whether a defendant is ever entitled to relief from assertions of private privilege by witnesses of his own.

Professor Hill, in challenging a defendant's right to plead for relief from private privileges asserted by his own witnesses, starts with a premise which he believes generates a paradox. His premise is that there exist only two ways to respond to a defendant's plea for relief from a witness' assertion of privilege: either override the privilege entirely by compelling the witness to testify in open court, or sustain the privilege by allowing the witness to remain entirely silent.\textsuperscript{83} Given the drastic impact of the former alternative on the witness, the defendant should be required to demonstrate in open court the actual necessity of full disclosure. As Professor Hill puts it, "a defendant claiming a constitutional detriment should be required to make a substantial and specific showing, based on something more than his own bare assertions, that the witness' testimony, if given, would tend to be exculpatory."\textsuperscript{84} Yet the very nature of such a required showing results in a paradox: either the defendant cannot marshal in advance sufficient evidence to justify compelling the witness to testify in open court, in which event his claim fails on its merits; or he can marshal such evidence in advance, in which event his request for additional evidence from the privileged witness should be dismissed as "incremental"\textsuperscript{85} and, hence, superfluous.\textsuperscript{86}

I shall postpone until Part III my reasons for questioning Professor Hill's distinction between witnesses for the prosecution and witnesses for the defense, as well as his distinction between defense witnesses' asserting government privileges and defense

\textsuperscript{82} Hill, supra note 3, at 1190, 1193.

\textsuperscript{83} Needless to say, Professor Hill does not make this assumption concerning statutory privileges that explicitly provide for in camera inspection on a lesser showing of cause than inspection in open court. The legislature in such cases clearly believes disclosure in camera to be a lesser intrusion on the underlying interest in confidentiality than disclosure in open court. Professor Hill's assumption, rather, is directed toward the great majority of privileges that do not explicitly envisage in camera inspection as an intermediate level of disclosure. With regard to privileges that "cannot fairly be read as making an exception for in camera disclosure" (Id. at 1188), Professor Hill assumes that in camera disclosure intrudes on confidentiality interests as much as disclosure in open court and, hence, that courts are constitutionally "powerless" to require in camera inspection. Id. at 1194.

\textsuperscript{84} Id. at 1182.

\textsuperscript{85} Id. at 1183.

\textsuperscript{86} As Professor Hill puts it, "[t]his approach to the problem produces the apparent anomaly that the defendant's showing of entitlement to a remedy tends to establish that he does not need the remedy." Id.
witnesses' asserting private privileges. In Parts II A and B below, I argue that (1) Professor Hill's premise regarding the undifferentiated burdens of disclosure does not hold true for most privileges, and (2) even where the premise holds true, his conclusion regarding the superfluousness of redress does not follow from his premise.

A. Professor Hill's Premise: The "Pregnancy" Nature of Privileges

In arguing that relief from privileges is either unjustified or superfluous, Professor Hill presumes that privileges are like pregnancy. One cannot be a "little" pregnant; one is either entirely pregnant, or not pregnant at all. The same holds true, so the premise goes, regarding the impairment of testimonial privileges. There are no gradations or degrees of impairment. Unless a legislature provides to the contrary, a privilege is destroyed as much by disclosure to a single person — even to a trial judge in camera — as by disclosure to the whole world.

This "pregnancy" theory of privileges may accurately describe some privileges. The privilege against self-incrimination, for example, is as much impaired by compelled disclosure to a magistrate in camera as to the whole world. Indeed, the latter privilege may be more impaired by disclosure to a magistrate than to the whole world. In that respect, however, the privilege against self-incrimination is sui generis and (contrary to what Professor Hill implies) disanalogous to other privileges. This point can be illustrated by considering the privilege of alleged rape victims regarding their prior sexual conduct. Disclosure to a judge in camera impairs the privilege less than disclosure to the judge plus his law clerk; disclosure to the judge and his law clerk impairs less than disclosure restricted to defense counsel alone; disclosure to defense counsel alone impairs less than disclosure to the jury in a nonpublic trial; and disclosure to a jury impairs less than disclosure to the newspapers. In short, like many privi-

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87 See Confrontation, supra note 17, at 581 n.38.
88 It is no accident that Professor Hill repeatedly turns to the privilege against self-incrimination to illustrate his thesis. See Hill, supra note 3, at 1181-82, 1186, 1193. The privilege against self-incrimination ideally supports his thesis, because it is a privilege for which in camera inspection is unavailable as a mediating procedure. The problem is not the illustration, but the wholly unsupported implication that the privilege against self-incrimination is typical of other privileges. For the proposition that the privilege against self-incrimination is atypical, see Westen, supra note 17, at 581 n.38.
89 See Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77
leges, the rape victim's privilege protects an interest in privacy that can be impaired in degrees, depending on the constituency and size of the audience.

The gradational nature of such privileges bears directly upon the kind of showing a defendant must make in order to compel a witness to testify. With respect to privileges that are destroyed as much by disclosure to a trial judge in camera as by disclosure in a public trial, a defendant has no alternative but to try in a single preliminary stage to marshall sufficient evidence to justify overriding the privilege — presumably to make what Professor Hill calls "a substantial and specific showing . . . that the witness's testimony . . . would tend to be exculpatory." On the other hand, with respect to privileges that are not as impaired by disclosure to a trial judge in camera as by disclosure to the world, a defendant can make his required showing in gradational stages: at each stage he need only make the degree of showing required for the restricted sort of disclosure at issue, thereby obtaining evidence for subsequent and fuller stages of disclosure. Unlike the previous defendant who must possess in advance all evidence needed to pierce a privilege tout a coup, the latter defendant, who starts with less evidence, can pierce the privilege in stages, using the already-acquired, privileged information to justify the further disclosures to which he may thereby become entitled.

Taglianetti v. United States provides a good example of how a court should treat gradational privileges. The defendant in Taglianetti sought to compel the government to produce the logs of certain illegally recorded telephone conversations in derogation of the government's asserted privilege for national defense secrets. The Court had previously held that a defendant is constitutionally entitled to compel disclosure in open court of privileged information regarding illegal surveillance, but only if he can show that the overheard conversation was his. The defendant in Taglianetti could not make a sufficient showing to that effect, because while he could show that the government had recorded other conversations of his on the same telephone, he could not adequately rebut the government's denial that the requested conversations were his. The Court could, perhaps, have

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COLUM. L. REV. 1, 37-38, 83-84, 88-96 (1977); Tanford & Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. PA. L. REV. 544, 590 (1980). Interestingly, Professor Hill admits that "disclosure to the court in camera is a far cry from disclosure to the defendant." Hill, supra note 3, at 1175 n.10.

Hill, supra note 3, at 1182.

concluded that the government’s privilege for national security secrets would be impaired as much by disclosure to the trial judge in camera as by disclosure to the defendant in open court. In that event, the Court would presumably have denied the defendant’s request on the ground that he had failed to make the kind of showing required for disclosure of the privileged information in open court. Instead, the Court held that the defendant’s showing, though not sufficient to justify adversary disclosure in open court, nevertheless sufficed to justify restricted disclosure to the trial judge in camera — thus implicitly holding that the government’s privilege for national security secrets was such that it would be impaired less by disclosure in camera than by disclosure in open court. Because of the gradational nature of the privilege, the defendant was given an opportunity to pierce the privilege in stages by making a showing that, though insufficient for open disclosure on an adversary basis, nonetheless sufficed for in camera inspection. The particular benefit to the defendant is a stepped process of “bootstrapping”: the stage of in camera inspection may produce sufficient additional information to justify the subsequent stage of adversary disclosure in open court.

To be sure, Professor Hill has something to say about gradational disclosures of the foregoing kind. He accepts the possibility of bootstrapping through in camera inspections, but only where the legislative authority that creates the privilege acknowledges that in camera inspection is less intrusive than disclosure in open court. He rejects bootstrapping with regard to privileges that do not explicitly envisage in camera inspection. In his view, therefore, the opportunity for in camera inspection depends entirely on state law. With regard to privileges that a state has declared to be “absolute” — or with regard to privileges that a state has declared to be as sensitive to in camera inspection as to disclosure in open court — in camera inspection

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43 The Court implicitly acknowledges the government’s “national security interest” in the secrecy of information relating to foreign intelligence gathering. See Alderman v. United States, 394 U.S. 165, 184 n.15 (1969). See also id. at 197-200 (Harlan, J., concurring & dissenting); id. at 209-211 (Fortas, J., concurring & dissenting).

44 The Court reasoned in a similar way in United States v. Nixon, 418 U.S. 683 (1974). The Nixon Court held that the special prosecutor was entitled to an in camera inspection of constitutionally privileged communication between the President and his advisors upon a lesser showing of need than would be required for complete disclosure in open court, thereby implicitly holding an in camera inspection was less of an intrusion on the constitutional interest underlying the President’s executive privilege than disclosure in open court. See 418 U.S. at 713-16.

45 See Hill, supra note 3, at 1189, 1194.
is constitutionally unavailable as a mediating device.

The problem with the aforementioned position is that it erroneously assumes that a legislature's labels are constitutionally conclusive and that courts are constitutionally precluded from piercing state-created privileges to assess the relative weights of the underlying interests. Courts may be bound by a state's characterization of the interests underlying its rules when courts pass solely on issues of state law. Courts are not so bound, however, in resolving federal claims that turn on relative assessments of state and federal interests. For in order to demarcate the scope of federal rights, a court must be able to make an independent assessment of the strength and scope of the competing state interests on the other side. Thus, as Professor Hill himself acknowledges, a court may inquire into the strength of a so-called "absolute" privilege in order to decide whether a defendant has made a sufficient constitutional showing to override the privilege altogether. By the same token, a court may inquire into the relative strength of a privilege in order to decide whether a defendant has made a sufficient showing to justify the

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46 As Professor Hill puts it, "[I]t is inappropriate for courts... to rule that some legislative determinations to protect confidentiality are entitled to greater respect than others." Id. at 1189. Ironically, in his discussion of government privileges, Professor Hill admits that in order to assess a defendant's constitutional claim, the courts must assess the state's "interest in maintaining secrecy," including its separate "interest" regarding "in camera submission[s]." Id. at 1191-92.

47 In Davis v. Alaska, 415 U.S. 308 (1974), the Court examined a state statute which created an absolute privilege for the confidentiality of information relating to the adjudication of juvenile delinquency. Nonetheless, because the interest underlying the defendant's constitutional claim clashed with the interest underlying the state-created privilege, the Court felt obliged and entitled to make an independent assessment of the strength of the state interest underlying the privilege. Having assessed the state's assertion of interest by constitutional standards of review, the Court concluded that the defendant's constitutional interests were paramount:

The claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining [the juvenile witness] about his being on probation. . . .

We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. . . . [For in] this setting we conclude that the right of confrontation is paramount to the state's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the juvenile witness] or his family by disclosure of his juvenile record . . . is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

Id. at 319. In other words, although the state of Alaska characterized its interest in the confidentiality of juvenile court records to be superior to the defendant's interest in obtaining evidence in his defense, the Court made its own independent assessment and came to a contrary conclusion.
more limited intrusion of in camera inspection.\footnote{See State v. Jalo, 27 Or. App. 845, _, 557 P.2d 1359, 1362-67 (1976) (Fort, J., concurring & dissenting). Judge Fort noted that although the statute creates an absolute privilege for a complaining witness' prior sexual conduct, courts should construe the statute to avoid constitutional conflicts with the right of a defendant to present evidence in his defense. So construing it, he felt the court should conclude that in camera inspection is less of an intrusion on the interests protected by the privilege than disclosure in open court.}

To be sure, this is not to say that an in camera inspection has no effect at all on the integrity of a privilege, or that state assertions regarding in camera inspection can be completely disregarded. Any compelled inspection, even in camera, may intrude to some extent upon the confidentiality interests that a privilege serves. The point is, rather, that in assessing a defendant's constitutional claim to a fair trial, a court may legitimately find (1) that despite a state's characterizations to the contrary, the state has less of a genuine interest in preserving confidentiality from a trial judge in camera than from the public as a whole,\footnote{In Washington v. Texas, 388 U.S. 14 (1967), for example, the Court was presented with a state statute which prohibited criminal defendants from calling accomplices as witnesses for the defense. The statute was based on the assumption that an accomplice's testimony is unreliable, and that the state's interest in shielding the jury from unreliable testimony could only be fully served by excluding the testimony altogether. Nonetheless, because the interest protected by the state's action conflicted with the defendant's right to present evidence in his own behalf, the Court made its own independent assessment of the strength of the state's interest. Having done so, the Court concluded that given the drastic effect of outright exclusion on the defendant's interest in presenting evidence in his defense, the state's interest in ensuring the reliability of criminal evidence would be adequately served by allowing the evidence to be admitted under cautionary instructions to the jury. Thus, although the state legislature had determined that outright exclusion was the only remedy that would fully serve its interests, the Court felt obliged and entitled to make its own independent assessment of the issue in the course of fashioning a constitutional remedy for the assertion of a constitutional right. See Compulsory Process II, supra note 17, at 198-204.}

A court cannot disregard everything a state says regarding the interests it wishes to safeguard. On the contrary, courts can and must attend to a state's expression of its interests in order to know what to place in the constitutional balance. The point is that the courts look to the state's representations as evidence of the state's real interests—interests that courts are authorized to ascertain for themselves.

This proposition, viz., that the courts are constitutionally authorized to make their own independent determinations of state interests, can be stated in a strong or a weak form. Under the weak form, a court may not disregard what it knows to be a state's statements of its own interests. The court, however, may disregard a state's superficial characterization of its interests when the latter conflicts with what the totality of the state's conduct suggests its real interests to be. In that event, the court does not set aside a state's statements of its own interests. Rather, the court makes a judgment that the state's statements as to its interests are contradictory, and that the court must give effect to what it believes the state really states its interests to be.

According to the strong form of the proposition, courts do have constitutional authority to disregard what a state unequivocally declares the weight of its interests to be. To illustrate the force of this argument, assume that a state has two separate interests—\(X\) and \(Y\)—that it declares to be of precisely equal weight. Assume further that a court has
that such a finding entitles a defendant to an in camera inspection upon a lesser showing of cause than would be required for disclosure in open court. When a court thus invalidates a privilege for the purpose of in camera inspection, it draws its authority from the same source that empowers it to take the more drastic step of invalidating a privilege altogether — the power of courts to fashion constitutional remedies for the assertion of constitutional rights. 49

B. Professor Hill’s Conclusion: The Superfluousness of Exculpatory Evidence

To recapitulate for a moment, Professor Hill proceeds from the premise that (unless a legislature specifically provides otherwise) disclosure of privileged information is an all-or-nothing matter. Based on that premise, he concludes that regardless of the kind of showing a defendant makes to override an assertion of privilege by a witness of his own, a defendant is doomed to fail. This is so, he argues, because the defendant either can make a “substantial and specific” showing that the witness possesses exculpatory evidence, or he cannot. If he cannot, his claim fails for insufficiency; if he can, his claim fails for superfluousness, because by hypothesis he already possesses so much exculpatory information that further disclosures would be “incremental.” 50

I have argued thus far that Professor Hill is mistaken in his premise regarding the all-or-nothing nature of privileges. With rare exceptions, such as the privilege against self-incrimination, state-protected interests in confidentiality are affected less by disclosures in camera than by disclosures in open court. I shall now argue that even where Professor Hill’s premise holds true, his conclusion regarding the superfluousness of further disclosures does not follow from his premise. (Nor does it follow that

previously determined that interest X is not sufficient to override a constitutional right of, say, free speech. What happens if a case now arises in which a court determines that interest Y conflicts with a right of free speech? Is the court obliged to conclude that because the right of free speech overrode interest X, and because the state says that interests X and Y are of equal weight, that the rights of free speech must also be deemed to override interest Y? Or is the court free to say that the two state interests are not of equal weight although the state says they are? If a court can do the latter, then it follows that courts do have constitutional authority to make their own assessments of the nature and weight of state interests, state declarations to the contrary notwithstanding.


50 Hill, supra note 3, at 1183.
the remedy of allowing a jury to draw an inference from a witness' assertion of the privilege against self-incrimination must be based on the same showing required to compel a witness to testify under a grant of use immunity.\textsuperscript{51}

Whether or not such disclosures are superfluous depends upon the constitutional standard for determining the materiality of exculpatory evidence in criminal cases. If privileged information is "immaterial" in a constitutional sense, it is superfluous and a defendant cannot complain about its exclusion. If, on the other hand, privileged information is "material" in a constitutional sense, then it is not superfluous and a defendant has a right to insist upon its admission into evidence.\textsuperscript{53}

Fortunately, the Court has articulated a fairly clear standard of materiality. With regard to information unprotected by privilege (or, as here, information no longer protected by privilege), a defendant can demand any item of evidence that may be even "merely helpful"\textsuperscript{55} to his defense. Presumably that means any item of evidence that "could . . . in any reasonable likelihood

\textsuperscript{51} As Professor Hill recognizes, there is a direct relationship between the "size" of a showing a defendant must make in order to obtain relief from a privilege and the intrusiveness of the remedy he seeks. The more a remedy intrudes upon legitimate state interests, the more a defendant must show in the way of cause; the less a remedy intrudes upon legitimate interest, the less a defendant must show in the way of need. See id. at 1181, 1193 & n.85. It is also apparent that drawing an inference from a witness' assertion of the privilege against self-incrimination is a less intrusive remedy than compelling the government to grant the witness use immunity. The inference imposes no burden on the prosecution that is not imposed by every probative inference in a defendant's favor. It imposes no burden on the witness as long as he is not himself on trial. An order granting use immunity, on the other hand, imposes a considerable burden on the prosecution, making it difficult for the prosecution to marshal a successful case against the witness in the future. See United States v. Turkish, 623 F.2d 769, 776 n.4 (2d Cir. 1980), cert. denied 49 U.S.L.W. 3493 (U.S. Jan. 12, 1981) (No. 80-436). Consequently, since the "size" of a defendant's showing depends on the intrusiveness of the remedy he seeks, and since the remedy of drawing an inference from assertion of the privilege against self-incrimination is less intrusive than compelling a grant of use immunity, it follows that a defendant is entitled to an inference on a lesser showing than would be required to override the privilege altogether.


\textsuperscript{55} See Compulsory Process II, supra note 17, at 214-15.

\textsuperscript{56} United States v. Agurs, 427 U.S. 97, 113 n.22 (1976).
have affected the judgment of the jury"— that is, any evidence that could raise a reasonable doubt in the jury's mind as to the defendant's guilt. Only the most trivial items of exculpatory evidence fail to satisfy this minimal standard. Once a defendant has made a showing sufficient to override a witness' claim of privilege, therefore, the witness would have to show that his expected testimony falls short of being even "merely helpful" to the defense. It is unlikely that a witness in that situation could ever make such a showing. It is even less likely that the prosecution could make such a showing with regard to the probative value of an inference from a witness' assertion of the privilege against self-incrimination.

III. PROSECUTION WITNESSES AND GOVERNMENT PRIVILEGES

Is a defendant ever entitled to constitutional relief from an assertion of privilege? Professor Hill, in answering this question, separates all assertions of privilege into two distinct categories: (1) a category consisting of privileges asserted by prosecution witness as well as all government privileges (whether asserted by prosecution witnesses or by witnesses for the defense), and (2) a category consisting of private privileges asserted by defense witnesses. Professor Hill distinguishes between the two categories because he believes that a defendant must have a greater showing of need to obtain relief from assertions of private privileges by defense witnesses than from assertions in the first category. He does not explain why prosecution witnesses should be treated differently from defense witnesses. He does, however,

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65 An inference is a particularly powerful form of evidence, because it brings to the jury's attention the probative value of information it has heard that, without the inference, it would have a difficult time evaluating for its worth. See Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harv. L. Rev. 321, 330-39 (1980). An inference regarding the probative value of a witness' silence is particularly important to the outcome of a case. Given the fact that the jury is instructed to draw no inference from the defendant's silence, it may be confused about significance of a witness' silence. Without instruction on the inference, they may have no idea how to assess the probative value of the witness' silence. That is precisely why the party who benefits from an inference from a witness' silence has such a strong interest in litigating the right to have the jury instructed of the inference. See, e.g., Jenkins v. Anderson, 100 U.S. 2124 (1980). For the law governing the inferences that flow from silence, see C. McCormick, EVIDENCE 656 (2d ed. 1972). For the probative significance of silence, see Saltzburg, A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence, 66 Calif. L. Rev. 1011 (1978).
66 See Hill, supra note 3, at 1181, 1190.
advance two reasons for believing that defense witnesses should be treated differently depending upon whether they assert government privileges or private privileges.

I do not share Professor Hill's confidence in the constitutional distinctions he draws. While there are interesting differences between prosecution witnesses and defense witnesses, as well as between government privileges and private privileges, the distinctions have nothing to with the quantum of evidence that defendant must present in order to become entitled to relief. Professor Hill's distinction between prosecution witnesses and defense witnesses rests implicitly on an unfounded assumption about differences between the right of an accused to "confront[t]" witnesses "against him" and his correlative right to "obtain[n]" witnesses "in his favor." In addition, his distinction between government privileges and private privileges finds insufficient support in the two reasons he advances.

A. The Alleged Distinction Between Defense Witnesses And Prosecution Witnesses

Why would one distinguish between prosecution witnesses and defense witnesses in granting a defendant relief from assertions of private privilege? The answer surely cannot be found in any differences in the importance or magnitude of the underlying privilege, because no logical relationship exists between the type of privilege a witness possesses and the particular party for whom he testifies. On the contrary, witnesses possess and assert

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87 One difference does exist between prosecution witnesses and defense witnesses: the harm caused by a prosecution witness' assertion of privilege can always be cured either by striking the witness' direct testimony or (if a jury is incapable of disregarding the evidence) declaring a mistrial and retrying the defendant without the prosecution witness' testimony; the harm caused by a defendant's assertion of privilege, however, can only sometimes be cured by striking a prosecution witness' testimony or declaring a mistrial. That is to say, sometimes the defense witness' assertion of privilege has the effect not of precluding the defendant from rebutting or impeaching a single prosecution witness' testimony, but of precluding the defendant from rebutting the very elements of the offense charged against him. In the latter event, the only effective remedy for assertion of a privilege is either compel the witness to testify or dismiss the prosecution.

88 One difference between government privileges and private privileges is that a court may use the threat of dismissal as a sanction for enforcing a government witness to testify, while dismissal would be an inappropriate sanction to use against the government for a private witness' refusal to testify. See note 18 supra.

89 U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

90 U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor").
privileges without regard to whether they are testifying as witnesses for the prosecution or witnesses for the defense.

Nor can the answer be found in any difference in the burdensomeness of the respective remedy, because the remedies for a witness' assertion of privilege do not depend on the party for whom the witness testifies. The appropriateness of the various remedies — e.g., dismissing the case, striking the witness' testimony, compelling the witness to testify, or drawing an inference from his silence — depends upon the impact of the asserted privilege on the defendant's ability to present his defense.61 Suppose, for example, that an asserted privilege operates to preclude a defendant from rebutting the testimony of a prosecution witness. The proper remedy there is either to strike the witness' testimony or to compel the witness to testify, regardless of whether the privilege is asserted by a witness for the prosecution or by a witness for the defense. This does not mean that the showing a defendant must make to obtain relief from a privilege is unrelated to the burdensomeness of the remedy, or that dismissal burdens the prosecution as much as striking a witness' testimony.62 It means, rather, that no necessary connection exists between the remedy invoked and the identity of the party for whom the witness testifies. By the same token, no necessary connection exists between the identity of the party for whom a witness testifies and the showing a defendant must make to obtain relief from the witness' assertion of a privilege.

Nor, finally, can the answer be that the direct testimony of a prosecution witness who refuses to answer questions on cross examination becomes too unreliable to be admitted into evidence. The constitutional standards that govern the admissibility of incriminating evidence are minimal: evidence is admissible unless it is so "inherently untrustworthy"63 or so lacking in "indicia of reliability"64 as to deprive a jury of "a satisfactory basis for eval-

61 The choice between striking the witness' testimony and proceeding with the trial on the one hand, or declaring a mistrial on the other, depends upon whether the court feels that an instruction to the jury to disregard the witness' testimony would be effective in removing the taint. If cautionary instructions are sufficient, there is no need to declare a mistrial and start afresh. If, however, the incriminating evidence is so compelling that cautionary instructions would not likely suffice, the appropriate remedy is to declare a mistrial and force the prosecution to begin afresh with a jury that has not heard the incriminating evidence. See Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 163 & n.444, 176-77 (1974).

62 I agree with Professor Hill that the size of a showing that the defendant must make to obtain relief depends upon the intrusiveness or burdensomeness of the remedy he is seeking. See Hill, supra note 3, at 1181, 1193 & n.85. See also note 51 supra.


Privileges and Fair Trial

Direct testimony by prosecution witnesses, delivered under oath in open court and in the presence of the defendant and trier of fact, more than satisfies the foregoing test, because such testimony exceeds in reliability the kinds of unsworn, out-of-court statements that are routinely admitted in the absence of cross-examination.

Moreover, if Professor Hill's exception for prosecution witnesses is based on the alleged unreliability of uncross-examined testimony, the exception would have to apply to assertions of privilege by some defense witnesses as well. Assume, for example, that instead of cross-examining a prosecution witness immediately at the close of his direct testimony, a defendant prefers to postpone examining the witness until he can examine the witness as a witness for the defense; assume further that when the defendant calls the witness as a witness for the defense, the witness asserts a privilege, thus thwarting the defendant’s efforts to examine him. The witness’ assertion of privilege as a witness for the defense renders his former testimony just as unreliable as if he had asserted it as a witness for the prosecution.

The real basis, I suspect, for distinguishing between prosecution witnesses and defense witnesses centers on an assumed difference between the right of a defendant to cross-examine witnesses against him and his correlative right to examine witnesses in his favor. The assumption is that when a defendant calls a witness as his own, the defendant acts at his peril, and he cannot complain if the witness responds by asserting a privilege (unless the defendant can show a “substantial and specific” need for overriding the privilege). Yet, so the assumption goes, when the prosecution calls the witness, the prosecution holds itself out as a guarantor that the witness will be available for cross-examination. Hence, the prosecution must either persuade the witness voluntarily to waive his privilege or do without the witness’ testimony.

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67 What is it, after all, that renders the prosecution witness’ direct testimony sufficiently unreliable to warrant striking it from the record? If it is the failure or inability of the defendant to probe the truth of the witness’ testimony, it should make no difference whether the failure comes to life immediately after the close of the witness’ direct testimony or later in the course of the defendant’s case in chief. The only difference between the two cases is one of timing. In the first case, the defendant seeks and fails to examine the witness directly at the close of his testimony. In the latter case, the defendant — preferring to structure the order of his proof differently — tries and fails to examine the witness as part of the defendant’s case in chief. In either event, the consequence of the witness’ assertion of privilege renders the prosecution witness’ testimony insufficiently reliable to be considered by the jury.
testimony.

There are two problems with the foregoing assumption. First even if the prosecution were constitutionally required to guarantee that witnesses whose statements the prosecution uses will be made available for cross-examination, the guarantee would not justify overriding the privileges of prosecution witnesses on a lesser showing of cause than is ordinarily required for defense witnesses. At most it would mean that in the absence of such ordinary cause, the prosecution would have to do without the witness' direct testimony. After all, the ability of the witness to stand on his claim of privilege should not depend on the prosecution’s supposed guarantee. The witness’ justification for remaining silent on cross-examination is the same as he would advance if examined as a witness for the defense — his legal right to assert a private privilege. His right to stand on his claim or privilege should not turn on whether he happens to be called as a prosecution witness as opposed to a defense witness. Nor should the latter have any bearing on the showing that must be made in order to override a witness’ assertion of privilege.

Second, and more serious still, it is wrong to assume that the state’s obligation to confront a defendant with witnesses “against him” exceeds in scope its obligation to produce “witnesses in his favor.” As I have argued elsewhere, the confrontation and compulsory process clauses each oblige the government to assist the accused in identifying, producing, and presenting witnesses in his defense. The only significant difference between the two relates to order of proof: the confrontation clause obliges the government to produce and tender for examination at the close of their direct testimony all available witnesses whose statements it uses in its case in chief; the compulsory process clause obliges the government to produce and tender for examination at the close of its case in chief all other witnesses whom the accused wishes to examine. The significant difference between the two clauses relates to the timing and not the scope of the defendant’s examination. Consequently, no reason exists why a defendant would have a greater right to override a prosecution witness’ private privilege than a defense witness’ private privilege, or why the prosecution would have a greater

**See generally Confrontation, supra note 17, at 601-24, arguing that the right of confrontation and the right of compulsory process are mirror images of one another and, hence, equal in scope.**

**See Westen, Order of Proof: An Accused’s Right to Control the Timing and Sequence in His Defense, 66 Calif. L. Rev. 935, 980-84 (1978). See also Westen, supra note 16, at 1203-10.**
obligation to guarantee the availability of a prosecution witness than the availability of a defense witness.

B. The Alleged Distinction Between Private Privileges and Government Privileges

Professor Hill gives two reasons for concluding that a defendant must make a greater showing of need to obtain relief from an assertion of private privilege than from an assertion of government privilege: (1) the government has a constitutional "duty" to disclose "evidence" in its possession that is "exculpatory or otherwise helpful to the defendant;"70 and (2) the government, as the holder of the government privileges, can always avoid the consequence of mandatory disclosure by simply dismissing its case. Both propositions are unquestionably true as statements of fact. As explanations, however, they fall short, because they fail to explain why government privileges should be overridden upon lesser showing of needs than private privileges.

To start with the second of the two explanations, it is perfectly true that the government, as the holder of government privileges, can always avoid the prospect of disclosure by simply dismissing its case. But that hardly explains why the government should be confronted with conditional disclosure in the first place. Nor does it explain why the government should be confronted with a choice between dismissal or disclosure upon a lesser showing than would justify compelling disclosure of a private privilege. To be sure, once a court determines that a continued assertion of a government privilege violates a defendant's right to a fair trial, the court can properly enforce the right in the face of continued wrongful assertion of the privilege by unilaterally dismissing the state's case. But the sanction of dismissal only comes into play once a court has made an anterior judgment that an assertion of privilege would deny a defendant a fair trial. By itself the potential sanction has no bearing on the threshold showing defendant must make to become entitled to relief in the first place.

As for the government's constitutional obligation to disclose exculpatory evidence in its possession, two things may be said. First, with respect to requested disclosures of exculpatory evidence (which are the only sort at issue here), private witnesses also have a legal obligation to give the court whatever truthful

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70 Hill, supra note 3, at 1193-94.
exculpatory evidence they possess.\textsuperscript{71} If the exculpatory evidence they possess is unprivileged, the defendant has a right to the disclosure without further ado; if their evidence is privileged, the defendant has the right to privileged evidence whenever he can make a “substantial and specific showing” that its suppression would deny him a fair trial. Unless one is willing to argue that government privileges do not apply at all in criminal cases (an argument that Professor Hill carefully avoids),\textsuperscript{72} there is no reason to believe that the government’s duty to disclose exculpatory evidence in its possession is greater in scope than the correlative duty of private witnesses to do the same. It follows, therefore, that as long as the two duties are of equal scope, the defendant should have to make the same kind of showing to disgorge privileged evidence from the government as he would have to make to disgorge similarly privileged evidence from a private witness.\textsuperscript{73}

Moreover, even if the government has a greater duty than private witnesses to disclose privileged evidence, it does not necessarily follow that such disclosure should be triggered by a lesser showing of cause. After all, the issue of cause does not arise with respect to privileged witnesses who admit that their evidence is exculpatory to the degree that justifies overriding the privilege. The issue of cause arises only with respect to witnesses who refuse to make such admissions. Thus, with respect to government privileges, the issue of cause only arises after a responsible official officially asserts that his evidence falls short of the kind that the Constitution obligates the government to disclose. Statements to that effect by responsible government officials are presumably entitled to greater weight than the comparable statements of private witnesses. As a consequence, a defendant, if anything, should have to make a greater showing of cause to rebut a government assertion of privilege than a private assertion. Hence, even if one assumes, arguendo, that the government has a greater duty of disclosure than nongovernmental witnesses, its greater degree of duty, nonetheless, may be offset entirely by the

\textsuperscript{71} This is what is meant by saying “the public has a right to every man’s evidence.” See United States v. Nixon, 418 U.S. 683, 709 (1974); Branzburg v. Hayes, 408 U.S. 665, 688 (1972). See also Note, “The Public Has a Claim To Every Man’s Evidence”: The Defendant’s Constitutional Right to Witness Immunity, 30 STAN. L. REV. 1211 & esp. n.1 (1978).

\textsuperscript{72} See Hill, supra note 3, at 1191.

\textsuperscript{73} Interestingly, after suggesting that government privileges and private privileges are distinct, \textit{id.} at 1181, 1190, 1192-94, Professor Hill seems to recognize that the controlling consideration in each case is the weight of the interest in confidentiality that the privilege is designed to safeguard. \textit{Id.} at 1191.
compensating factor of greater credibility, thereby leaving the defendant in ultimately the same position vis-a-vis government as vis-a-vis private privileges.

In conclusion, no reason exists for subjecting government privileges to a different standard of disclosure than private privileges. Rather, the kinds of showings that are required to justify relief from privileges depends solely upon the respective weight of the interests in confidentiality that underlie them. Once the weights have been ascertained, the same scale is used to assess them, regardless of whether they take the form of government privileges or private privileges.

CONCLUSION

People who respond to law review articles tend to exaggerate their differences at the expense of common agreement. I would regret having done so here, because Professor Hill and I agree on many things, including the futility of thinking that this is a subject on which either of us will have the final say.